

Negotiating Contracts for Goods & Services

Legal Requirements & Best Practices

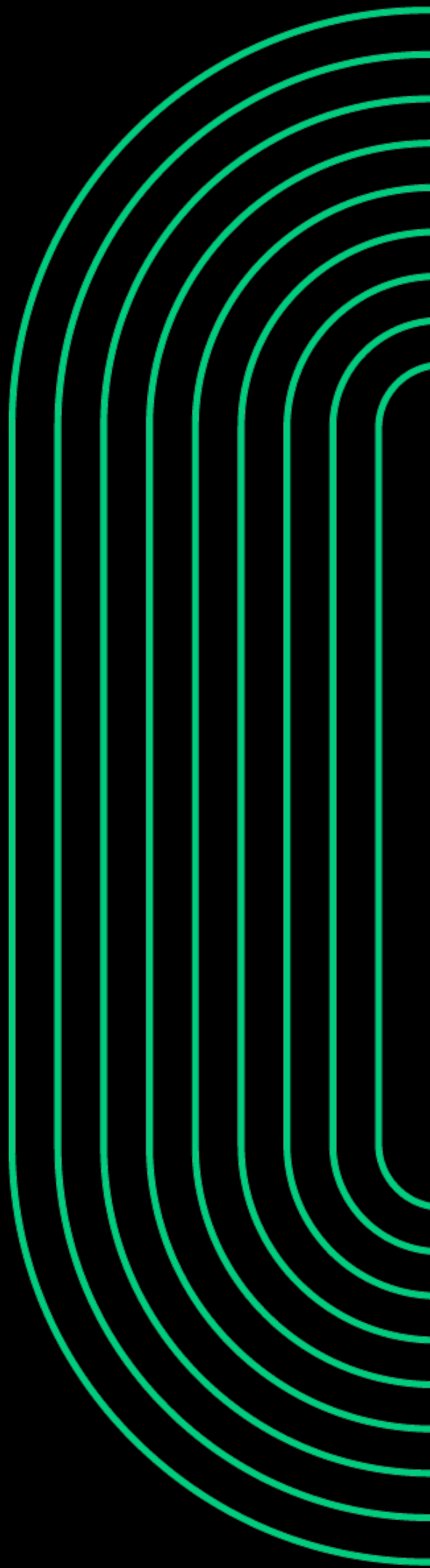
*Michigan School Business Officials
2024 Annual Conference
Session C24*

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April 24, 2024

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Today's Roadmap & Objectives

WHY & WHAT

- ❖ Drivers of the Deal
- ❖ Contract Formation and Negotiations
- ❖ Risk Allocation
- ❖ Modifications, Renewals and Transitions

OBJECTIVES

- ❖ Identify the drivers and key issues behind contracted services.
- ❖ Recognize contract provisions and problematic areas/issues.
- ❖ Understand key areas when negotiating with contractors.

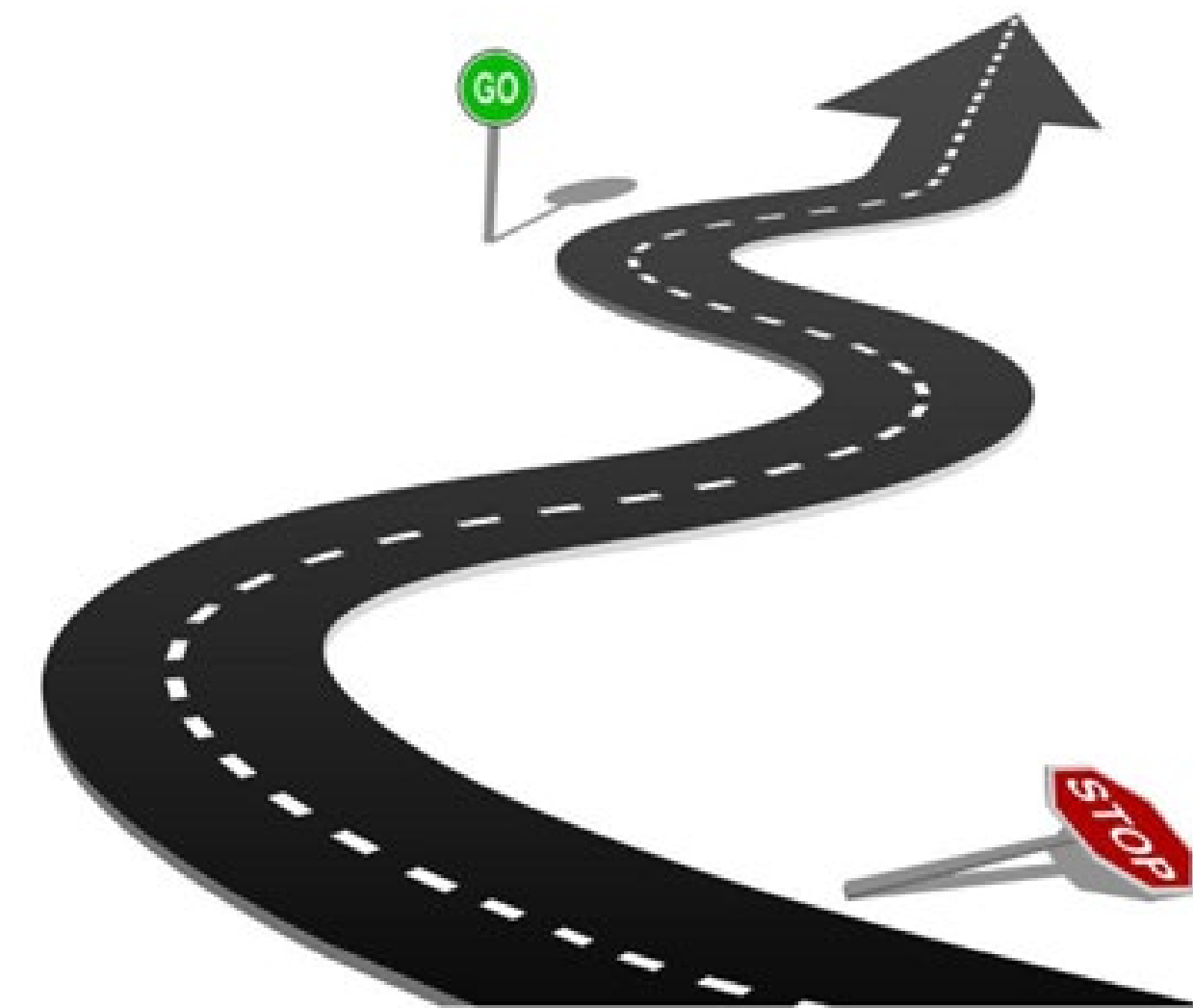


Drivers of the Deal

A contract is intended to be the “**roadmap**” for a **business transaction**. Building an effective contract requires an understanding of the **relationship** between the parties, the **context** of the transaction, the key provisions for the contract, as well as the **desired outcome**.

Preliminary Issues to Consider:

- ❖ Are we dealing with **services** or the **sale of goods** (S/M/E) or **construction**?
- ❖ Are there any **statutory or regulatory provisions** that mandate or affect the deal?
 - Is there a specific form to follow?
 - Are specific provisions mandated or prohibited by law?
- ❖ What are the **industry norms** for the particular transaction?
- ❖ Is there a “**course of dealing**” between the two parties?
- ❖ What **process** is/was used for the transaction?
 - Were procurement documents (such as an RFP) used?
 - How will the RFP and Contract intersect?



Drivers of the Deal – Competitive Bidding

Procurements under State Law (Michigan Revised School Code):

- ❖ School Building Construction – MCL 380.1267
 - Requires competitive bidding (if **material & labor > \$29,572**).
- ❖ Supplies, Materials & Equipment (S/M/E) – MCL 380.1274
 - Requires competitive bidding (if **item or group of items > \$29,572**).

Procurements under Federal Law (2 CFR Part 200.317-200.326)

- ❖ Procurement procedures must reflect State law requirements, provided they also conform to federal law and regulations.
- ❖ Micro-Purchase Threshold (MPT) (**<\$10,000**).
- ❖ Simplified Acquisition Threshold (SAT) (**>\$10,000 but <\$250,000**).
- ❖ Formal Bidding (**>\$250,000**)

But Be Aware of School District Policy Requirements!



Drivers of the Deal – Legal Requirements

Common Law

- ❖ The common law embodied in court decisions remains the primary source of contract law.
- ❖ Often used as the “gap filler” when statutory provisions, or the contract terms, are silent.

Statutory Requirements

Various Federal and State statutes and regulations govern/mandate the form and content of contracts. Examples that School Districts often encounter include:

❖ State Laws & Regulations

- Performance & Payment Bonds in Construction Projects (>\$50,000).
- School Transportation Contract must provide that contract is revocable if contractor does not have buses inspected by MSP or uses bus that failed inspection, and contractor must provide inspection results within 30 days.
- ***NEW*** Michigan Prevailing Wage Laws on Construction Projects.

❖ Federal Laws & Regulations

- Federal National School Lunch Program and related federal laws & regulations.
- Contract Remedies (if contract over \$150,000).
- Termination (Cause and Convenience) if contract over \$10,000.
- Davis-Bacon Federal Prevailing Wage in Construction Projects.

❖ Uniform Commercial Code (“UCC”)

- Contracts for sale of goods must be in writing (MI > \$1,000; UCC > \$500).



Case Study #1

Acme School District is in the market for various pieces of equipment (new desks and chairs etc.) and also is looking to secure a new custodial services contractor. The School District is working on compiling the documents needed to develop an RFP for each of these procurements.

Is the timeline for each of these procurements identical?

Should the School District include a form of contract in each RFP?

Should the School District use the same template contract in each RFP?

Is there a difference between a contract for goods and a contract for services?

Could the School District simply issue a Purchase Order for the equipment purchase?

Contract Formation – Statute of Frauds

What is required under the Statute of Frauds (SOF)?

- ❖ The SOF is the exception to the rule that contracts do not need to be **in writing** to be enforceable.
- ❖ Purpose is to prevent fraud or the opportunity for fraud.
 - Applies to **only certain types of contracts**. A few examples are:
 - interests in land
 - contracts with performance beyond 1 year
 - sales of goods
 - modifications of contracts without consideration
- ❖ An agreement that is void under the SOF cannot be used for any purpose.
- ❖ However, courts can enforce the doctrine of part performance if performance was in reliance on an agreement otherwise subject to the SOF if it would be fraud on performing party.

Contract Formation

What is required?

A contract must include **certain elements** to be considered **valid and enforceable** and failure to include the essential elements may run the risk that a court will set aside a potentially advantageous contractual arrangement or complete the terms of the contract with provisions other than those desired by one or more of the parties.

Four Essential Elements to a Contract:

- Parties competent to contract.
- Proper subject matter.
- Mutuality of Agreement (Offer and Acceptance).
- Legal Consideration.

What are the Elements of a Contract?



Contract Formation

What provisions make an effective contract?

To have an effective contract, you should always keep in mind that the purpose of a contract is not to entertain, inform, or convey theories. Rather, the purpose of a contract is to **accurately set forth the intent and agreement of the parties** to the contract. All contract drafting should keep the “big picture” in mind.

Keys to an Effective Contract

■ Clarity

- Understand the factual basis for the transaction.
- Understand the legal context of the transaction.

■ Proper Form

- Not all contracts look alike!

■ Proper Structure

- Utilize appropriate terms and conditions.



Contract Formation – Setting Expectations

□ When **setting the expectations**, key issues to consider include:

- How often must the various components be provided?
- What are the expected staffing and/or delivery levels?
- What is included in the contract price?
- What metrics of the contract price are important?
- What are the remedies for deficient performance?
- What is the term of the contract and how is it terminated or renewed?



Contract Approval Issues

For School Districts, many contracts must be **approved** by the Board of Education prior to execution. However, not all contracts may require Board of Education approval. It is important for a school district to have **protocol in place** regarding how contracts must be internally approved and who may execute contracts.

Key Contract Approval Issues

- ❖ Ensure school district and building-level staff know boundaries of and protocol for contracting.
- ❖ If Board of Education approval is not required, maintain internal controls for contract approval and execution.
- ❖ If Board of Education approval is required, take finalized contract to Board for approval, or have Board authorize administration to negotiate, finalize and execute contract within defined parameters, with the advice and review of legal counsel.

Case Study #2

Acme High School wants to enhance certain aspects of the athletic programs offered at the High School. The High School's Athletic Director works out a few "deals" with companies that are able to provide various goods and services. The companies provide the Athletic Director their form contracts and he signs several contracts on behalf of the High School without obtaining any approvals from the Board of Education or central administration.

What issues arise if the School District uses a vendor's contract?

What issues arise if an individual signs a contract without proper approvals?

What protocol should be in place to guard against improper contracting?

Basic Contract Provisions

Parties to the Contract

If do not correctly identify the parties, there can be repercussions.

- Names of parties need to be accurate.
- Include type of entity (corporation, LLC etc.)
- Make sure entity is still a valid entity

Beware of Multiple Parties

- Who will be liable for contract?
- What type of consents/notices will be necessary for default, etc.?

Beware of Affiliates!

- Parents, subsidiaries, affiliates are separate entities.
- However, a contract may bind you against all.

Other Issues with the Parties

- Parties in different jurisdictions may have different expectations or interpretations.
- Different idioms and word meanings of the law.



Basic Contract Provisions

□ Date of the Contract

- A Contract is not invalid without a date.
- Effective Date
 - Date executed
 - Different date before or after date executed



□ Term & Termination

- Law implies “reasonable time” but best to specify time for performance.
- “Time is of the essence” clause is key.
- Define how contract can be terminated.
- Address renewal terms.
- Without termination date, contract is terminable at will.

Basic Contract Provisions

□ Scope of Services

- What buildings are subject to Services?
- General vs. Detailed Specifications
- Frequency of Services

□ Staffing Expectations

- Level of both Management and General Labor Personnel
- Shifts of personnel will perform the Services
- Expected wages and other items under Contract Price
- What Services are included in Contract Price vs. Additional Services?

□ Contract Pricing

- What is included and when can additional fees be charged?

□ Supplies and Equipment

- Who is responsible for Supply inventory, ordering, procurement and payment?
- Who owns, repairs and replaces equipment?



TERMS
AND CONDITIONS

Basic Contract Provisions

□ Payment & Consideration

- Pre-Payment
- Open Account
- Payment Terms
 - Frequency of Invoicing
 - Frequency of Payment
 - Ability to Dispute Payment

□ Remedies

- Define (or limit) the remedies a party can pursue upon breach.

□ Risk Allocation Provisions

- Insurance, Indemnification, Limitation of Liability

□ Signatures

- Identify Name of Person/Entity & Authority to sign
- Electronic Signatures



Risk Allocation – Representations & Warranties

❖ Representations

- A representation is a **statement of fact**
- One party to the contract will indicate/agree that a **certain fact(s) are true**.

❖ Warranties in General

- A warranty is a **promise that a fact (such as a representation) is true**.
- Warranties are obligations that a party undertakes by agreement or that are imposed by law
- Warranties memorialize the **commitments and expectations** to which the seller and buyer will be held accountable.
- A **warranty is future-oriented** – it effectively acts a promise to indemnify the “promisee” if the fact warranted proves to be false.

❖ Issues to Consider

- What do they cover? How long do they last? Who is representing what?
- How does the School District enforce?



Risk Allocation - Indemnification

*Indemnification is an obligation by one party to **compensate another party for certain losses, damages, and costs**. These losses could be asserted directly by the other party or by a third party.*

❖ What does “Contractual Indemnification” usually include?

- Indemnification – pay for losses caused by 3rd party claim
- Hold Harmless – not hold other party responsible for loss caused by party
- Duty to Defend – indemnifying party must defend against all claims

❖ What is Enforceable?

- Laws may limit enforceability. For example, in Michigan law limits indemnification clauses against Michigan municipalities, schools and other public bodies.
- Unconscionability

❖ Indemnification vs. Limitation of Liability



Risk Allocation - Indemnification

❖ Scope of Coverage

- Important to **define** exactly what parties (and related persons/entities) are covered.
- Important to **define the scope** of what is covered (claims etc.)
 - Broad = “arising from or in connection with”
 - Narrow = “caused by” or “resulting directly from”
- Important to **limit scope**
 - Not responsible for losses arising out of indemnified party’s actions
 - Willful vs. gross negligence vs. negligence
 - Acts/Omissions, breach of contract, breach of warranty, etc.

❖ One size does not fit all

- Consider specialty clauses, such as:
 - Environmental
 - Intellectual Property



Risk Allocation - Insurance

❖ Common Types of Coverage

- Commercial General Liability Coverage
- Automobile Liability Coverage
- Workers' Compensation Coverage
- Employer Liability Coverage
- Excess/Umbrella Coverage
- Professional Liability Coverage

❖ One size does not fit all

- Review with Risk Manager/Insurance Carrier
- Consider clauses, such as:
 - Additional Insured
 - Require Certificates before work performed
 - Require notice before termination



Contract Provisions – Boilerplate

- ❖ **Boilerplate provisions are often simply cut and paste from one contract to another without much thought about the potential impact of their use. However, these clauses conceal significant legal and business implications that can produce unwanted future results if not tailored to the specific circumstances of the transaction.**
- ❖ **Understanding Boilerplate provisions will aid in the avoidance of pitfalls and unintended consequences in the contract.**
 - All boilerplate is not “boilerplate”
 - Do NOT fall into the “we have this in all our contracts” trap.
 - The more specific will govern over the more general.
- ❖ **Examples Include:**
 - Governing Law
 - Amendments, Assignments and Successors
 - Waivers and Notices



BOILERPLATE

Contract Negotiations – Rules to Live By...

□ Know Your Leverage

- Eating the Elephant vs. Eating the Peanut
- Contractual Right vs. Commercial Relationship

□ Stick to the **CRAPP....Really!**

- **C** = Clear and Concise
- **R** = Reasonable
- **A** = Avoid Ambiguity
- **P** = Practicable
- **P** = Prophylactic – Anticipate...Think twice draft once



□ Follow The Golden Rule

- Do not ask for something you are not willing to give in return!

Case Study #3

Acme School District's Administration is very busy and needs to enter into a contract for services. The next Board of Education meeting is coming up soon and the School District has contracted for these services previously. To save time, the Administration finds an old contract and changes the dates and parties and enters into the contract.

How often should a contract be reviewed and updated?

If I have a contract with a vendor that I have used for a long time, should it ever be reviewed?

What issues can arise from using outdated forms of contracts?

Why should I have an attorney draw up or review a contract?

Contract Negotiation – Best Practices

❖ Timing of Procurement and Contracting

- Procure goods and services at the correct time.
- Consider whether Board of Education Approval is required.
- Consider delivery/start-up time required by contractor.

❖ Approval Process/Authority to Sign Contracts

- Review Board Policies.
- Understand what authority has been granted by Board of Education.
- Maintain internal protocol for individuals who have contracting authority.

❖ Using Proper Contract Documents

- Understand what is basis for contracting (RFP or procurement process).
- Understand applicable laws that mandate contract provisions.
- Maintain internal protocol for individuals who have contracting authority.

❖ Engaging Legal Counsel

- When is best time to engage legal counsel?
- What information is needed for effective legal counsel review?





Thank you!

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